Low Poh Kim v Pengarah Tanah dan Galian Negeri Selangor & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-826–06 OF 2012
PRASAD ABRAHAM J
16 JANUARY 2014

Civil Procedure — Counterclaim — Counterclaim against co-defendant — Counterclaim by third, fourth and fifth defendants against first and sixth defendants — Whether there was proper and valid counterclaim pleaded against first and sixth defendants — Whether counterclaim should be dismissed as incompetent

Land Law — Indefeasibility of title and interests — Insufficient instrument — Second defendant effected transfer of land by using Power of Attorney (POA) — Whether POA was riddled with inconsistencies — Whether impugned POA was rendered void — Whether computerised document of title was issued negligently — Whether transfer of land was effected by insufficient or void instrument — Whether transaction defeasible and invalid

The plaintiff had been the original registered and beneficial owner of a piece of land situated in Selangor (the land). On 16 March 2011, the second defendant, a fraudster claiming to be the plaintiff's attorney under a power of attorney dated 14 December 2010 (the POA), used the POA to effect a transfer of the land to the third, fourth and fifth defendants, without the plaintiff's knowledge. The second defendant holding out to be the plaintiff's attorney under the POA had applied for a new computerised title to the land from the Pentadbir Tanah Hulu Selangor (the sixth defendant), which was responsible for managing the Master Titles Registration for the lands held under their jurisdiction. The plaintiff claimed that he had never empowered the second defendant by way of the irrevocable POA to act on his behalf in the matter of the transfer of the land to the third, fourth and fifth defendants. The plaintiff further claimed that he had not signed the POA and that his name and his IC number as stated in the impugned POA were incorrect. When the plaintiff discovered that ownership of the land had been transferred to the third, fourth and fifth defendants he lodged a police report. The plaintiff then filed the present claim against the second, third, fourth and fifth defendants as well as the parties responsible for safeguarding the interests of the registered proprietors of land in Selangor, namely the first and sixth defendants. It was the plaintiff's case that the use of the POA was invalid and contrary to the law, and the transfer of the land to the third, fourth and fifth defendants, was obtained

by way of an insufficient or void instrument. As such, the plaintiff contended that the transaction was defeasible and invalid and should be cancelled. The broker for the transaction between the second, third, fourth and fifth defendants and the solicitor acting for the parties to the transaction confirmed that the person holding himself out to be the donor of the POA was not the plaintiff. The plaintiff also produced a copy of the original title to the land and submitted that he had not taken delivery of the computerised title. The third, fourth and fifth defendants counterclaimed against the plaintiff and also against the first and sixth defendants on the grounds that the officers of the latter had been negligent in allowing the wrong IC number to be inserted in the document of title and not strictly complying with the provisions of the National Land Code ('NLC').

Held, allowing the plaintiff's claim and dismissing the counterclaim:

(1) The relevant provisions of the NLC, ie s 5A and the Fourteenth Schedule, clearly set out the procedure that must be followed, before a computerised title could be issued to replace an existing title to the land. However, the evidence in the present case clearly showed that the first and the sixth defendants did not have a system in place to ensure compliance with the exchange of an old title for a new computerised title as provided for under the NLC. In the present case, the plaintiff was still in possession of the original title to the land, when the new computerised title to the land was issued. In the circumstances, the computerised title issued was an insufficient and void document and therefore any transaction based on the same would be defeasible pursuant to s 340(2)(b) of the NLC (see para 10).

(2) The impugned POA purportedly executed by the plaintiff was riddled with inconsistencies and glaring matters that would have put any reasonable person on notice that caution would have to be exercised. Forensic evidence had been tendered by the plaintiff to show that the signature of the donor who signed the impugned POA was not that of the plaintiff. On this ground alone, the impugned POA would be rendered void as the plaintiff had not empowered the second defendant to act on his behalf (see para 14).

(3) The conduct of the officers of the first and sixth defendants involved showed a failure to carry out their functions correctly and as a consequence the plaintiff was almost nearly deprived of his land, which would have amounted to a breach of the plaintiff's rights preserved under art 13 of the Federal Constitution. In the case of the impugned POA, the discrepancies as to the description of the parties and the address of the plaintiff being at KLCC should have at least caused the first to sixth

defendants to investigate further rather than to take the impugned POA at face value. As such, the conduct of the first and sixth defendants had been wanting (see paras 18 & 20).

(4) Whilst the Rules of Court 2012 allowed for a counterclaim against the plaintiff, it did not allow the third, fourth and fifth defendants to file a counterclaim against the first and sixth defendants in the present action. Instead, the third, fourth and fifth defendants should have cited the first and sixth defendants as additional defendants together with the plaintiff in their counterclaim before a counterclaim was properly before the court. Further, the pleadings had not been amended to reflect the counterclaim against the first and sixth defendants and neither had the provisions of O 15 r 3(2) of the ROC 2012 been complied with. As such, there was no proper and valid counterclaim pleaded against the first and sixth defendants and the counterclaim against them was dismissed. The counterclaim against the plaintiff was also dismissed (see paras 22–23).

[Bahasa Malaysia summary

Plaintif merupakan pemilik asal dan benefisial sebidang tanah yang terletak di Selangor ('tanah'). Pada 16 Mac 2011, defendan kedua, seorang penipu yang mengaku sebagai peguam plaintif di bawah surat kuasa wakil ('SKW') bertarikh 14 Disember 2010, menggunakan SKW untuk melaksanakan pindahan tanah kepada defendan ketiga, keempat dan kelima, tanpa pengetahuan plaintif. Defendan kedua yang mengenalkan diri sebagai peguam plaintif di bawah SKW telah memohon satu geran berkomputer untuk tanah tersebut daripada Pentadbir Tanah Hulu Selangor ('defendan keenam'), yang bertanggungjawab menguruskan Pendaftaran Hakmilik Induk untuk tanah-tanah yang dipegang di bawah bidang kuasa mereka. Plaintif mendakwa bahawa dia tidak pernah memberi kuasa kepada defendan kedua melalui SKW yang tidak boleh dibatalkan untuk bertindak bagi pihaknya dalam perkara berkenaan pindahan tanah kepada defendan ketiga, keempat dan kelima. Plaintif seterusnya menghujah bahawa dia tidak menandatangani SKW dan bahawa nama dan kad pengenalannya seperti yang dinyatakan dalam SKW yang dipertikaikan itu adalah salah. Apabila plaintif mendapati bahawa milikan tanah tersebut telah dipindahkan kepada defendan ketiga, keempat dan kelima, dia membuat satu laporan polis. Plaintif kemudiannya memfailkan tuntutan ini terhadap defendan kedua, ketiga, keempat dan kelima begitu juga dengan pihak yang bertanggungjawab untuk menjaga kepentingan pemilik tanah berdaftar di Selangor, iaitu defendan pertama dan keenam. Kes plaintif adalah penggunaan SKW adalah tidak sah dan bercanggah dengan undang-undang dan pemindahan tanah kepada defendan ketiga, keempat dan kelima yang diperoleh melalui instrumen yang tidak mencukupi atau tidak sah. Oleh itu, plaintif menghujah bahawa transaksi tersebut adalah boleh dibatalkan dan tidak sah dan seharusnya dibatalkan. Broker untuk transaksi antara defendan kedua, ketiga, keempat dan kelima

dan peguam cara yang bertindak untuk pihak-pihak kepada transaksi tersebut mengesahkan bahawa orang yang mengemukakan dirinya sebagai pemegang SKW adalah bukan plaintif. Plaintif juga mengemukakan satu salinan geran asal ke atas tanah tersebut dan menghujah bahawa dia tidak menerima penghantaran geran berkomputer. Defendan ketiga, keempat dan kelima menuntut balas terhadap plaintif dan juga terhadap defendan pertama dan keenam atas alasan bahawa pegawai defendan keenam bertindak cuai dengan membenarkan nombor kad pengenalan yang salah dimasukkan ke dalam dokumen geran dan tidak benar-benar mematuhi peruntukan dalam Kanun Tanah Negara ('KTN').

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas:

(1) Peruntukan KTN iaitu, s 5A dan Jadual 14, dengan jelas menyatakan prosedur yang perlu diikut sebelum satu geran berkomputer boleh dikeluarkan untuk menggantikan satu geran asal kepada tanah. Walau bagaimanapun, keterangan dalam kes ini dengan jelas menunjukkan bahawa defendan pertama dan keenam tidak mempunyai sistem di tempat mereka bagi memastikan pematuhan dengan penukaran geran alam untuk geran baru berkomputer seperti yang dinyatakan di bawah KTN. Dalam kes ini, plaintif masih memiliki geran asal tanah tersebut apabila geran berkomputer ke atas tanah tersebut dikeluarkan. Dalam keadaan ini, geran berkomputer yang dikeluarkan adalah dokumen yang tidak mencukupi dan tidak sah dan oleh itu apa-apa transaksi berdasarkan geran tersebut boleh dibatalkan menurut s 340 KTN (lihat perenggan 10).

(2) SKW yang dipersoalkan kononnya dilaksanakan oleh plaintif penuh dengan perkara-perkara bercanggah dan ketara yang sepatutnya memberi amaran kepada mana-mana orang munasabah bahawa perlu berhati-hati. Keterangan forensik yang ditender oleh plaintif untuk menunjukkan bahawa tandatangan wakil yang menandatangani SKW adalah bukan plaintif. Atas alasan ini sahaja, SKW yang dipersoalkan dianggap batal memandangkan plaintif tidak memberi kuasa kepada defendan kedua untuk bertindak bagi pihaknya (lihat perenggan 14).

(3) Tindakan pegawai defendan pertama dan keenam yang terlibat menunjukkan kegagalan untuk menjalankan tugas mereka dengan betul dan akibatnya, plaintif hampir kehilangan tanahnya, yang juga merupakan pelanggaran hak plaintif yang dilindungi di bawah perkara 13 Perlembagaan Persekutuan. Dalam kes SKW yang dipersoalkan, percanggahan berhubung deskripsi pihak-pihak dan alamat plaintif iaitu di KLCC sepatutnya menyebabkan defendan pertama hingga keenam untuk menyiasat lebih lanjut daripada menerima SKW yang dipersoalkan pada nilai permukaan. Oleh itu, tindakan defendan

pertama dan keenam mengundang padah 'had been wanting' (lihat perenggan 18 & 20).

(4) Walaupun Kaedah-Kaedah Mahkamah 2012 membenarkan untuk tuntutan balas terhadap plaintif, ia tidak membenarkan defendan ketiga, keempat dan kelima untuk memfailkan tuntutan balas terhadap defendan pertama dan keenam dalam tindakan ini. Sebaliknya, defendan ketiga, keempat dan kelima sepatutnya merujuk defendan pertama dan keenam sebagai defendan tambahan bersama dengan plaintif dalam tuntutan balas mereka sebelum tuntutan balas dikemukakan selengkapnya di mahkamah. Selanjutnya, pliding-pliding tidak dipinda untuk menunjukkan tuntutan balas terhadap defendan pertama dan keenam dan begitu juga dengan peruntukan A 15 k 3(2) KKM 2012 telah dipatuhi. Oleh itu, tiada tuntutan balas yang sempurna dan sah diplid terhadap defendan pertama dan keenam dan tuntutan balas terhadap mereka ditolak. Tuntutan balas terhadap plaintif juga ditolak (lihat perenggan 22–23).]

Notes

For a case on counterclaim against co-defendant, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) para 2698.

For a case on insufficient instrument, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3536–3542.

Cases referred to

Lim Chin Sim & Others v AGS Harta Sdn Bhd & Others Civil Suit T-Track 4: 21–84 of 2005 (unreported) (refd)

Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713; [2012] 3 CLJ 271, HC (refd)

Shayo (M) Sdn Bhd v Nurlieda Sidek & Ors [2013] 7 MLJ 755; [2013] 1 CLJ 153, HC (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

Federal Constitution art 13

Government Proceedings Act

National Land Code ss 5A, 12, 12(1)(b), 12(3)(d), 13, 16(1), (2), s 157A, 340, 340(2), (2)(b), (3), Fourteenth Schedule, 8, 8(9)(a), (b), (c), (d), Form 14A

Rules of Court 2012 O 15 r 3, r 3(2)

Goh Meng Yen (Nabir Azwa with him) (Iza Ng Yeoh & Kit) for the plaintiff.

Kam bt Sani (Legal Officer, Selangor Legal State Offices) for the first and sixth defendants.

Rehvathi a/p Krishnasamy (Lalitha a/p Suppiah with her) (Teh Soon Kee & Partners) for the third, fourth and fifth defendants.

Prasad Abraham J:

[1] This is another unfortunate case of an attempt to deprive a person of their property perpetuated through fraud, forgery and the use of an insufficient or void instrument. Apart from the main actors being the fraudsters, but through the ineffective administrative conduct by the first and sixth defendants the fraudsters were able to render a performance worthwhile of appreciation by 'the Academy of Fraudsters' if there was ever one, and the result, the said land was transferred to the third to the fifth defendants. Let me first set out the undisputed facts of this case:

(a) for more than 45 years, the plaintiff had been the original registered and beneficial owner of a piece of land known as Geran Mukim No 4745, Lot Nos 3325 and 3326 Mukim of Hulu Yam, State of Selangor since the issuance of the original title certificate on 24 February 1965 ('the said land');

(b) the first defendant is the party authorised and given the responsibility under s 16(1) of the National Land Code to be sued on behalf of the Selangor State Authority for any action, suit or other proceeding relating to land.

(c) the first defendant is obliged under the law and under the National Land Code to keep the master titles register for all lands within their jurisdiction and only to register the transfer of the land if it is in accordance with the law.

(d) the sixth defendant is the party appointed by the state authority under s 12(1)(b) of the National Land Code under the instruction of the first defendant according to s 12(3)(d) of the National Land Code among others to manage, inter alia, the master titles registration for the lands under their jurisdiction.

(e) it is admitted by the second, third, fourth, defendants that the plaintiff did not know any of the second, third, fourth, defendants and that they do not know him either.

(f) on 16 March 2011, the property was transferred to the third, fourth and fifth defendants by way of a Form 14A that was signed by the second defendant supposedly as the plaintiff's attorney by way of a power of attorney dated 14 December 2010 and which was registered by the sixth defendant with the Kuala Kubu Land Office on 15 December 2010.

(g) the transfer of the land to the third, fourth and fifth defendants was first discovered by Low Hoe Hoy, the plaintiff's daughter, in June 2011 when

she saw a signboard that was put up by them on the said land advertising the land for rental. When the plaintiff's son, Low Kim Mun, called the number on the sign board, a man answered to tell him that the land was for rental at RM1,800 a month and that he had bought the land from an agent. The plaintiff's son then conducted a land search at the Pejabat Tanah Kuala Kubu Baru and found out that the ownership of the land has been transferred to the third, fourth and fifth defendants. Low Kim Mun then went ahead to lodge a police report on 21 June 2011 on the sale and transfer of the property to the third to the fifth defendants without the knowledge and agreement of the plaintiff as its registered owner.

(h) it is agreed by all the defendants that the plaintiff was not the party who had agreed to sell the land to the third, fourth and fifth defendants and to appoint the second defendant as his agent because DW4 and DW5 who were witnesses both agreed under cross-examination that the person whom they saw and who supposedly signed the power of attorney as 'Low Poh Kim' did not look like the plaintiff at all and had an entirely different identity card.

(i) the plaintiff had worked and toiled the said land for over 40 years until recently where age and health had overtaken him but still had in his possession the original issue document of title ('IDT') which was produced in court.

[2] There were several issues raised between the plaintiff and the first and sixth defendants and I propose to deal with issues two, three and four which I now set out:

(a) that the use of the power of attorney dated 11 December 2010 and Form 14A dated 16 February 2011 by the second, third, fourth and fifth defendants to transfer the property from the plaintiff to the third, fourth and fifth defendants is invalid and contrary to the law;

(b) that the transaction is defeasible and invalid and should be cancelled under s 340(2) and (3) of the National Land Code as it was obtained by way of forgery or by an insufficient or void instrument; and

(c) that the third, fourth and fifth defendants have unlawfully acquired their title in the property in the purported exercise of power or authority conferred by written law.

[3] Which in my view is the crux of the case for the plaintiff. The transaction was effected by a person holding out to be the plaintiff claiming to have applied for a new computerised title pursuant to a power of attorney purportedly granted by the plaintiff to the second defendant. Let us first look at the plaintiff's original title ie bundle B p 1 read together with bundle B, p 2 which clearly shows the plaintiff is described on the issue document of title as Low

Poh Kim with his address at 123, Kg Pisang Ulu Yam Lama, 44300 Batang Kali Ulu Selangor (see also bundle B p 7). The plaintiff eventually produced the original title in court. A copy the IC of the plaintiff new and old is found at (p 58 of bundle B).

[4] The next document to be examined is the irrevocable power of attorney dated 14 December 2010 purportedly granted by the plaintiff to the second defendant (pp 12–15 of bundle B). Firstly, the donor of the purported power is described as Low Kim Poh and not the plaintiff and the IC will clearly bear this out. We now know the law firm that prepared this document did not exist as a firm. For that matter, the donee's name is not correctly set out. Over the p 13 of bundle B the plaintiff's address is described as Suite 1.33, 21st Floor KLCC which is certainly not the address of the plaintiff. The solicitor who attested the purported signature of the plaintiff is not on the roll of Advocates & Solicitors.

[5] The second defendant then purported to use the power of attorney to effect a transfer of the said land to the third and fourth and fifth defendants (see pp 16–20 of bundle B). It is to be noted that both DW4, the broker for the transaction between the second and the third, fourth and fifth defendants and DW5 the solicitor both confirmed that the person holding himself out to be the donor of the said power of attorney was not the plaintiff as shown in the photographs. So the charade of the plaintiff purportedly granting an irrevocable power to the second defendant was now complete. The question then is whether the transfer to the third, fourth and fifth defendants is by virtue of an insufficient and/or void instrument valid.

[6] With regards to the issue document of title, the plaintiff produced to court the original issue document of title and its veracity was not challenged. If that being the case, how could a transfer have been registered on the basis of a computerised title ('IDK') being issued. The relevant provisions of the National Land Code, ie s 5A and the Fourteenth Schedule in the National Land Code clearly set out the procedure that must be followed, before a computerised title could be issued to replace the old title in particular s 8 of the Fourteenth Schedule and in particular sub-s 9, which I now set out:

> (9) Upon the conversion of an existing document of title to a computer printed document of title under the preceding subparagraphs, the Registrar shall-
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> (a) make two copies of the plan from the existing register document of title, where in the case of final title, from the copy as approved by the Director of Survey and Mapping under paragraph 396(1)(e), in Form B1 or B2, as the case may be, and shall be duly authenticated under his hand and seal;
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> (b) *endorse across the face of the existing register document of title to the effect that the title in question has been converted to the computer printed register*

document of title, and on the making of such endorsement the existing register document of title shall be deemed to have been cancelled;

(c) *call upon the proprietor to take delivery of the computer printed issue document of title and the plan of the land; provided that where the conversion is effected by the Registrar on his own accord under subparagraph (5), he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him; and*

(d) *cancel and destroy the existing document of title when submitted to him.*

[7] It is clear, that there was no evidence led to show the plaintiff had taken delivery of the computerised title and the fact the original title was in the possession of the plaintiff and the same was produced in court, clearly shows that sub-s 9(d) in particular had not been complied with, refer to notes of evidence para 7–22 on p 63 (*Jilid* 1) dated 30 April 2013 and I quote:

Court

Q: So ok. Tuan Saiful macam mana? What is the position? Yang tadi saya tanya soalan tu boleh jawab?

A: Yang Arif, di Pejabat Tanah ni kita tak ada simply melayanlah. Melayan mana-mana individu yang datang nak surrender title without any urus niaga ataupun bukan urus niaga. So datang simply saya nak tukar title baru because ada title baru. So kita tak akan melayan macam tu lah. Might as well kalau kita tengok title dia ok, dia punya dokumen masih elok lagi kita kata you buatlah any transaction sama ada you nak ambil alamatkah, dan sekarang dah mudahlah. You ambil alamat kita akan proses tukar alamat dan sebagainya then kita akan issue new title. So title lama tu kita akan ambil kita akan shred. Tapi kalau simply datang nak tukar memang tak ada

Counsel for Plaintiff

Q: Ini bukan soalan Yang Arif, Yang Arif tanya ada buku perserahan

A: Buku perserahan

Q: Yang orang menyerahkan surat hakmilik lama

Court

Q: Kalau bila-bila masa yang rekodkan bahawa ...

A: Tak ada, memang tak ada buku.

Q: Tak ada?

A: Because tiada any transaction. Buku yang kita rujukkan ni hanya buku-buku yang melibatkan transaksi urus niagalah

Counsel for Plaintiff

Q: Tapi macam mana jika ada transaksi pemindahan milik, jadi kamu akan memerlukan surat hakmilik asal untuk diserahkan betul tak? **A**

A: Kalau

Q: Sistem manual ada apa-apa buku perserahan yang direkodkan, kita telah menerima surat hakmilik manual **B**

A: Oh tidak, tu

Q: Tiada?

A: Tak

Q: Tidak **C**

A: Dia tak ada split booklah, contohnya kita terima transaksi permohonan untuk pindah milik, di dalam borang permohonan pindah milik itu 14 A dan juga title, so title yang owner serahkan tu kita takkan salin dekat another buku lain bermaksud kita terima, tak ada **D**

Q: Kita sudah terima pada tarikh, tidak ya?

Court

Tiada ya? Alright **E**

Counsel for Plaintiff

Q: Jadi ia merupakan satu anggapan, assumption, system Land Office, system Pejabat Tanah bahawa sekiranya computer title telah dikeluarkan ini bermakna dan digunakan, ini bermakna bahawa surat hakmilik manua asal telah pun dikembalikan kepada Pejabat Tanah? **F**

A: Ya.

[8] Paragraph 4–35 at p 44 of notes of proceedings for 30 April 2013: **G**

Counsel for Plaintiff

Q: Sekiranya salinan register hilang atau musnah, ianya mesti di suatu notis mesti dihantar kepada pemilik berdaftar di bawah Kanuan Tanah Negara dan Kanun Tanah Negara juga memerlukan Pentadbir Tanah untuk meletakkan nota dalam warta kerajaan negeri, betul tak? **H**

A: Betul.

Q: Dan sekiranya suatu dokumen, issue document of title dihilangkan atau dimusnahkan dalam tangan pemilik berdaftar, maka pemilik berdaftar itu mestilah membuat laporan polis dan surat akaun dalam, sebelum dia boleh membuat permohonan kepada Pentadbir Tanah untuk mengissue atau mengeluarkan salinan baru, issue document of title, betul tak? **I**

A: Betul, sehingga tahun, pertengahan tahun 2012 sahaja.

Q: Sehingga tahun 2012?

A: Pertengahan

Q: Maaf

A: Sehingga pertengahan tahun 2012.

Q: Sehingga? Apa berlaku selepas itu?

A: Selepas itu, ada arahan daripada arahan daripada dulu, Ketua Setiausaha Negara, menyatakan tidak perlu ada laporan polis dan sebagainyalah. Sekadar hanya akuan bersumpah, tetapi apa yang kita praktiskan di Pejabat Tanah, kita still nakkan laporan polis dan juga akuan bersumpah.

I also refer to para 17 p 48 of notes of proceedings for 30 April 2013.

Counsel for Plaintiff

Q: Adakah Encik bersetuju bahawa issue document of title, jika ianya diperbaharui ya, mengikut rekod Register Document of Title, ianya akan mempunyai butiran yang identical dengan register document of title?

A: Yes mesti sama.

And also p 75 I quote:

Counsel for Plaintiff

Q: Setuju ya? Ok jadi Encik Saiful, boleh tak Encik Saiful lihat tukar ganti hakmilik yang mengatakan endorsan hakmilik ini telah ditukar ganti kepada hakmilik catitan computer pada borang 50KSEK11BK di bawah jadual ke 14 Kanun Tanah Negara pada ... adakah tuan boleh lihat cop itu yang merah itu?

A: Boleh

Q: Adakah tuan bersetuju bahawa walaupun ianya mempunyai cop Pentadbir Tanah disana, tak ada sebarang tarikh ditulis dan tak ada sebarang tandatangan di bahagian itu?

A: Setuju.

Q: Setuju?

A: Setuju

Q: Jadi menurut Register Document of Title, Encik sendiri ianya maaf ianya mempunyai satu pengendorsan tukar ganti hakmilik. Tetapi ianya tidak mempunyai tandatangan Pentadbir Tanah dan tidak mempunyai tarikh tukar ganti itu dilakukan. Betul tak?

A: Setuju.

Q: Jadi bukankah ini, bukankah Encik setuju bahawa ini merupakan satu perkara yang tidak teratur di bawah prosedur Kanun Tanah Negara? Kalau tidak diketahui bilakah tukar ganti tu dilakukan, tidak diketahui sama ada ia kah diluluskan oleh Pentadbir Tanah kerana tiada ada tandatangan.

A: Saya di waktu tu saya tak pasti dia punya sama ada dia masuk ke lump sum ataupun go one by one. Jadi kalau masukkan lump sum maybe ada, because ada certain tu yang bertanda.

Court

Ok itu saya faham may be you don't know. Tapi sekarang saya fikir kalau saya fikir balik, keterangan tadi, when I asked you, Tuan Saiful ada kata 'you cannot just go and surrender the old title like that, mesti ada transaksi ok? So ikut ini kalau saya ikut keterangan Encik Saiful patutnya ada transaksi bukan? Kalau tidak, macam mana boleh tukar jadi computer title yang baru?'

[9] The evidence clearly shows, the first and the sixth defendants did not have a system in place to ensure compliance with the exchange of an old title for a new computerised title as provided for under the National Land Code.

[10] In my judgment, the IDK ie the computerised titled issued was an insufficient and void document and therefore any transaction based on the same would be defeasible. I refer to my decision in *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors reported in* [2012] 8 MLJ 713; [2012] 3 CLJ 271, where I held in (2) and (3) and I quote:

(2) In order for the computerised title to be issued pursuant to s 5A of the NLC, a notice must be sent by the plaintiff to surrender the old title in exchange for the new computerised one. On the facts, there was no evidence to suggest that such notice had been sent. This was in contravention of the Fourteenth Schedule to the NLC. (paras 8 & 10)

(3) The issuing of a computerised title to the fourth defendant as a registered proprietor when the original title to the said land continued to be in the possession of the plaintiff was ultra vires as it contravened the provisions of the s 5A of the NLC and Fourteenth Schedule and also s 340(2)(c) of the NLC. It follows therefore that any instrument executed by the director of the fourth defendant would be void and insufficient per se. (para 17)

[11] I also refer to the case of *Shayo (M) Sdn Bhd v Nurlieda Sidek & Ors* reported in [2013] 7 MLJ 755; [2013] 1 CLJ 153 where it was held by Justice Harmindar Singh Dhaliwal:

(1) The issuance of a computerised IDT in the name of D1, being a breach of the provisions of the Fourteenth Schedule of the NLC, was ultra vires and unlawful and

deprived the plaintiff of its land in violation of art 13(1) of the Federal Constitution. (para 34)

(2) The IDT issued in D1's name was a nullity and void with the effect that any other instruments executed thereon were also void and liable to be set aside at the instance of the rightful registered proprietor. In view of the void title at its inception, subsequent bona fide purchasers for value could not avail [2013] 1 CLJ 155 *Shayo (M) Sdn Bhd v Nurlieda Sidek & Ors themselves of the protection afforded by the proviso to subsection (3) of* s 340 of the NLC. *The title issued to D7 had to be cancelled and the plaintiff restored as the registered proprietor and true legal and beneficial owner of the land. (paras 35 & 38)*

(3) The issuance of a seco006Ed title for the land to D1 — when the original manual IDT continued to be in the plaintiff's possession and was the valid title — was without doubt due to a grave failure by D8–D12 to adhere to the strict mandatory provisions set out in the Fourteenth Schedule of the NLC. D8–D12 had failed to ensure reasonable or adequate security of their computer system. With the computer system under their control it could not lie in their mouths to say they were not responsible for any misuse of the computer system. (paras 33 & 47)

(4) The irresistible supposition was that fraud was going on within the offices of D8-D12. No inquiry was conducted to ascertain how D1 could have been issued with a computerised IDT. Despite a departmental report regarding the falsification of the title to the land having been prepared in 2009, no registrar's caveat was lodged on the land until March 2011. No further investigation was done and in fact D8-D12 thereafter allowed the land to be transferred twice more to D6 and D7. Even when the registrar's caveat was lodged D8-D12, despite being aware the plaintiff's interest in the land was at risk, did not think it fit to inform the plaintiff of D6's application to remove the caveat. D8-D12 were grossly negligent and in breach of their statutory duties. (paras 48, 51 & 53).

(5) Under ss 12 and 13 of the NLC designated officers of the government were charged with the responsibility of administrating the NLC and all things connected with it. These were the officers who were the persons responsible for the torts complained of here and they were the very same officers the plaintiff had named as defendants in this action. Section 16(2) of the NLC was also consistent with that approach. (paras 56 & 57)

[12] The first and sixth defendants produced D1 to show compliance with the Fourteenth Schedule of the National Land Code. However as I have observed earlier the other requirements of s 8(9), (a), (c) and (d) of the Fourteenth Schedule of the NLC had not been complied with, D1 remains ultra vires.

[13] Based on the aforesaid and on this ground alone, the plaintiff's claim against the third, fourth and fifth defendants should be allowed. However, I have decided to proceed to examine the other documents I have alluded to earlier.

[14] The power of attorney purportedly executed by the plaintiff as the donor to the second defendant as donee (bundle B, p 12–15) was the basis by which the transfer of the said land was effected to the third, fourth and fifth defendants by the second defendant. As I have already pointed out earlier the said impugned document is riddled with inconsistencies and glaring matters that would have put any reasonable person on notice that caution would have to be exercised. Forensic evidence has been tendered by the plaintiff to show the signature of the donor who signed the impugned power of attorney is not that of the plaintiff. On the ground alone, the impugned power of attorney would be rendered void as the plaintiff did not empower the second defendant to act on his behalf (see bundle B pp 33–36). I also accept the evidence of PW3 the forensic expert on the point.

[15] To reiterate the following with regards to the impugned power of attorney, I find:

(a) based on the evidence of PW3 and his forensic report, i accept as a fact, the plaintiff did not sign the said impugned power of attorney; and

(b) the identity card number of the plaintiff as stated in the impugned power of attorney is not that of the plaintiff (bundle B p 58 and p 62) (see also p 108 of bundle B).

I refer to the unreported judgment of Dato' Noraini J in the case of Dalam Mahkamah Tinggi Malaya di Shah Alam Dalam Negeri Selangor Darul Ehsan *(Civil Suit T-Track 4: 21–84 of 2005) Lim Chin Sim & Others v AGS Harta Sdn Bhd & Others* wherein Her Ladyship dealt with the importance of authenticating of identity cards and I quote:

> [30] There's the issue of the copies of the I/C of both plaintiffs being questionable. According to SD1, both Plaintiffs had gone to sign the SPA and the transfer form in Tetuan Zamani's law firm. According to SD2, Tarmizan, he would have checked the I/C of both plaintiffs to ensure that all documents are in order. However he admitted he did not sign as a witness before the plaintiffs and that he admitted the copies of the I/C were not certified by him as certified true copy, which is a requirement of the Land Office. According to SD2 (3), if such a thing did occur, the transfer form would be rejected. Now SD2 himself admitted that he did not sign the copy of the I/C as certified true copy. It means that he had not compared that the photostat copy of both plaintiffs IC with the real I/C. How could that be. So who signed the transfer form that SD2 put his signature as a witness. I am of the opinion that this support the plaintiffs case that they did not sign both the SPA and the transfer form.
>
> [31] There's the question of the I/C themselves. Counsel for the plaintiffs submitted that in respect of the identity cards of the vendors under the alleged SPA, during

trial, the first plaintiff upon looking at the identity cards at page 57–58 of bundle B(ii) marked as exh P13(a) and 13(b), had clearly maintained that the identity cards as shown at pg 57–58 are not the plaintiffs' identity cards.

(i) It is to be noted that both copies of the identity cards at pages 57–58 were clearly not a valid I/Cs as they lack the characteristics of the valid I/Cs.

(ii) If compared with the actual and valid ICs of the plaintiff at pp 1 and 3 of bundle B(ii), it can be clearly seen that both the ICs at pp 57–58 do not have the old IC number, the alleged picture of the first plaintiff cannot be seen and the second plaintiff and the other elements on the Malaysian flag and the word 'Malaysia' cannot be seen.

[35] If every office and staff at the Land Offices were deligent they would have noticed that the photostat I/C of Lim Chin Sim were so black it's not possible to identify the person and that the I/C's were not certified true. The explanation given was that after checking, all documents appeared to be okay. If there's any document that's questionable, the application to transfer would be put on hold and that they would contact lawyers submitting the transfer documents. Witness for the second defendant gave evidence that the application was not put on hold. In fact one witness for the second defendant testified that they had received the photostat copies of the I/Cs which was certified true copy but that those copies were handed back to the lawyers. I am of the opinion that the second defendant themselves had not given a good explanation why there was a transfer of name from the plaintiffs to the first defendant when clearly the lawyers for the first defendant had submitted photocopies of the I/C which is black and obviously a forgery. How could it be that after three checks on documents submitted for transfer, they did not detect the defective I/Cs.

(c) the purported address of the plaintiff being in KLCC apart for being incorrect is so incredulous that alarm bells should have rung loud and it was clear that something was awry with this document.

(d) the evidence of the plaintiff, that he never had intended to dispose the said land and had in fact dealt with the land in his will, clearly negates any intention on the plaintiff's part, to empower the second defendant to transfer the said land to the third, fourth and fifth defendants.

[16] I find therefore as the impugned power of attorney is void and insufficient; the transfer to the third, fourth, and fifth defendants is defeasible pursuant to s 340(2)(b) of the National Land Code. I refer to the decision of the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* reported in [2010] 2 MLJ 1; [2010] 2 CLJ 269 in particular holding (8)–(9) where it was held:

(8) The Court of Appeal in the present case was unnecessarily concerned with the manner the appellant got his name registered on to the title. The appellant's registered proprietorship was not an issue as it was not challenged by any party including the third respondent. The question

was whether the charges registered in favour of the third respondent were defeasible under sub-(2)(b) of the NLC (para 60).

(9) the fact that the third respondent acquired the interest in good faith for value was not an issue. Once it was satisfied that the charges arose from void instruments, it automatically followed that they were liable to be set aside at the instance of the registered proprietor, namely, the appellant, (para 61).

[17] The defence of the first and sixth defendants is essentially one of procedure that argument is premised on tort and Government Proceedings Act but in this case, s 12 of the NLC and its provisions have been complied with by the plaintiff. As far as the third, fourth and fifth defendants are concerned, I am of the view, in light of my findings their defence is unsustainable. I therefore found for the plaintiff and made the orders that I did tailored to the justice of the case ie to restore the deprivation of the plaintiff's constitutional right to the said land pursuant to art 13 of the Federal Constitution.

[18] Before I deal with the third, fourth and fifth defendants' claim against the first and sixth defendants i feel it prudent to again remind the first and sixth defendants' duty in administering and maintaining an efficient, transparent and a credible approach to safe guard the interests of the registered proprietors of land like the plaintiff. It is not enough to take a 'on the surface approach' when glaring anomalies are starkly before the first and sixth defendants. As a consequence the plaintiff was almost nearly deprived of his property save for the intervention of the court which would have amounted to a breach of the plaintiff's rights preserved under art 13 of the Federal Constitution which is a fundamental liberty of the plaintiff. This right of the plaintiff is sacrosanct and if the first and sixth defendants have by their conduct caused the plaintiff to be deprived of the said land, apart from the provisions of the National Land Code and infringent of the same, it is also a breach of fundamental liberties preserved by the Federal Constitution which would allow the court to intervene. These fundamental liberties as preserved by the Federal Constitution are the very core of the nation and its citizens and any breach of the same will have ramifications on the plaintiff who is after all part of the citizenry of this nation. The court must be proactive in ensuring the fundamental liberties provisions of the constitution must not be rendered impotent.

[19] I make reference again to my decision in *Uptown Properties Sdn Bhd* and to the extract from my judgment in that case which I now set out.

> [23] I find the conduct of the officers involved shows a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith. I would echo that portion of the judgment of the Federal Court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155; [1980] 1 LNS 120 at p 160 the judgment of Abdool Cader J at p 160 and I quote:

> In tune with the prelude with which we commenced at the outset, we would by way of postlude in restating the message this decision delivers enjoin every official concerned with or involved in exercising powers and duties under the Code and related legislation to regard this judgment as regrettably necessary but solemn caveat, giving warning, loud and clear, against any wanton disregard or sloppy application of express statutory provisions in the exercise of their functions, and one to be understood, marked and digested as such. We would add that they must strive to be au fait with the law they have to administer and should not hesitate in the course of their statutory duties to seek legal advice whenever necessary from the State Legal Adviser or his confreres and should never put the latter in the invidious and perhaps even an intolerable position they found themselves in these proceedings of having both in the court below and before us to make feeble attempts at ex post facto justification for the inexcusable defaults of others on a post hoc ergo propter hoc premise, quite apart from unnecessarily constraining the justly aggrieved to pit themselves in curial combat against the massive and bottomless purse of the state — much to the delight, perhaps, of the legal profession.

[29] The plaintiff had effectively been deprived of his right to the said land a right provided for under art 13 of the Federal Constitution, I set out art 13:

> 13 Rights to property.
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[30] In my judgment, administrative short comings amounting to negligence and breach of duty cannot justify the plaintiff being dispossessed of its interest in the said land and the fact that it has happened is a violation of the plaintiff's constitutional right under art 13 of the Federal Constitution.

[31] Perhaps in the current climate of the administration of the country and the transformation policy and reforms being carried out by the government, I would be prepared to say that the first defendant owed a duty of care to ensure that by its own mistakes and negligence, the rights of the plaintiff enshrined in art 13 of the Federal Constitution are not rendered nugatory. This court cannot sit back and allow the plaintiff to be deprived of its land. If not checked a landowner who takes comfort in the document of title he holds, could have his rights be taken away from him 'nilly willy'.

[20] In the case of the impugned power of attorney, the discrepancies as to the description of parties and the address of the plaintiff being at KLCC should have at least caused the first and sixth defendants to investigate further rather to take the impugned PA at face value. Looking at s 157A of the National Land Code, that obligation is enshrined in the Code. So for those reasons the conduct of first and sixth defendants has been wanting.

[21] I now turn to the counterclaim against the first and the sixth defendants

by the second, third and fourth defendants. It is contended that the first and sixth defendants have been negligent in allowing the wrong IC number to be inserted in the issue document of title. Further, to allow a third party to collect the new title (IDK) without complying strictly with the Fourteenth Schedule of the National Land Code, which is the alleged fraud in this case.

[22] I had pointed out to counsel for the third, fourth and fifth defendants that whilst the Rules of Court 2012 allows for a counterclaim against the plaintiff, the third, fourth and fifth defendants could not just file a counterclaim against the first and sixth defendants and what the third, fourth and fifth defendants should have done in this case was to have cited ie first and sixth defendants as additional defendants together with the plaintiff in their counterclaim before a counterclaim is properly before the court (see O 15 r 3 of the Rules of Court 2012). See also Supreme Court Practice 1982 (i) p 198. Further, the pleadings had not been amended to reflect the counterclaim against the first and sixth defendants and nor had the provisions of O 15 r 3(2) been complied with.

[23] I therefore rule there was no proper and valid counterclaim pleaded against the first and sixth to answer, so I dismissed the third, fourth and fifth defendants' counterclaim against the first and sixth defendants and the counterclaim against the plaintiff was also dismissed. The counterclaim against the first and sixth defendants is incompetent and was accordingly dismissed.

Plaintiff's claim allowed and counterclaim dismissed.

Reported by Kohila Nesan